No. 85-1249 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

Petitioner,

-against-

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a state court decision by writ of certiorari when Petitioner's constitutional claims were not raised or decided in the state court.

2. Whether the New York Court of Appeals deprived Petitioner of his rights under the Constitution of the United States by the "judicial modification of an unambiguous statutory definition" in determining that Petitioner, having been adopted out of his biological family at birth, is not "issue" within the meaning of his biological grandmother's will.

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CITATIONS TO THE OPINIONS AND ORDERS IN THE COURTS BELOW

The petition herein (the "Petition") is for a writ of certiorari to the Court of Appeals of the State of New York. The order of remittitur of the Court of Appeals, dated October 24, 1985, reversed an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which had affirmed a decree of the Surrogate's Court of Westchester County, New York.

1. The order of the Court of Appeals dated December 26, 1985, denying reargument appears at page A-63 of the Appendix to the Petition.

2. The order of the Court of Appeals dated October 24, 1985, reversing the order of the Appellate Division appears at page A-62 of the Appendix to the Petition.

3. The opinion of the Court of Appeals was reported at *Matter of Best*, 66 N.Y.2d 151, 485 N.E.2d 1010, 495 N.Y.S.2d 345 (1985).

4. The Order of the Court of Appeals dated February 5, 1985, granting leave to appeal was reported at 64 N.Y.2d 605, 486 N.Y.S.2d 1025, and appears at page A-25 of the Appendix to the Petition.

5. The order of the Appellate Division dated July 16, 1984, affirming the decree of the Surrogate's Court appears at page A-27 of the Appendix to the Petition.

6. The opinion of the Appellate Division was reported at *Matter of Best*, 102 A.D.2d 660, 477 N.Y.S.2d 431 (2d Dept. 1984).

7. The opinion of the Surrogate's Court of Westchester County was reported at *Matter of Best*, 116 Misc. 2d 365, 455 N.Y.S.2d 487 (1982).

The transcriptions of the opinions of the Court of Appeals, Appellate Division and Surrogate's Court in the Appendix to the Petition have minor omissions of words and citations, and we request this Court to rely instead upon the published reports of those opinions.

STATEMENT OF THE CASE

The case decided the following question of New York law: Is a child whose mother surrendered him at birth for adoption by strangers presumed to be included in a class gift to "issue" in his biological grandmother's will? The lower courts said yes. The Court of Appeals said no.

In 1952 Ardith Kurner, later Ardith Reid ("Ardith"), gave birth to a son out of wedlock. Petitioner claims to be that son, and solely for purposes of the will construction at issue here, it has been stipulated that he is. Ardith placed Petitioner with an agency for adoption immediately after his birth. Ardith's mother, Jessie C. Best ("decedent"), knew of Petitioner's birth and placement for adoption. In 1960 Ardith married William R. Reid. They had one child, Anthony R. Reid ("Respondent"), born in 1963.

Decedent died in 1973. From 1952 until decedent's death neither decedent nor Ardith had any contact with Petitioner. They did not know his name, or where he lived, or who had adopted him, or whether he was dead or alive.

In her will, decedent left her residuary estate in trust for Ardith. Article TENTH (A) of the will instructed the trustees:

> "Upon the death of my daughter, ARDITH REID, leaving issue her surviving, to divide said trust fund into as many shares or parts as there shall be such issue, *per stirpes* and not *per capita*, and to continue to hold each of such shares or parts in trust during the life of one of said persons."

If Petitioner were counted as "issue" of Ardith within the meaning of the will, he would be the beneficiary of a continuing trust of one-half the fund. If not, the entire fund continues in trust for Respondent.

Decedent treated Petitioner's birth and adoption as a family secret and did not even tell the attorney who drafted her will

of Petitioner's existence. Three years after decedent's death, Ardith divulged to decedent's co-executor and co-trustee, Morgan Guaranty Trust Company of New York, the circumstances surrounding Petitioner's birth and adoption. Through the efforts of Sheltering Arms Children's Services and the use of detectives, the executors located Petitioner and made him a party to the accounting for decedent's estate. As Ardith was still alive, in the executors' accounting it was not necessary to determine who succeeded to the trust property after her death.

Ardith died in 1980. Her death made it necessary to determine whether Petitioner was included in the class of "issue" under decedent's will. The trustees raised this question in their petition on the trustees' accounting, asking the court to construe decedent's will. Both Petitioner and Respondent filed objections to the account. Petitioner moved for summary judgment determining, *inter alia*, that he was a beneficiary under the will. Respondent moved to dismiss Petitioner's motion and cross-moved for summary judgment determining, *inter alia*, that Petitioner was not a beneficiary under the will. The Surrogate's Court granted Petitioner's motion. The Appellate Division affirmed. The Court of Appeals reversed and granted Respondent's motion.

The interpretation of decedent's will involved both the canons of will construction and evidence of decedent's intent.[1] The Surrogate's Court and the Appellate Division held that an adopted-out child is presumed to be included in a class gift to issue in a biological ancestor's will, and that the evidence of decedent's intent did not overcome that presumption. The Court of Appeals held that an adopted-out child is presumed not to be included

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[1] The evidence of decedent's intent was in the form of affidavits. At the request of the Surrogate's Court, the parties entered into a stipulation that (i) if the individuals whose affidavits were submitted in support of the motion and cross-motion for summary judgment testified at a hearing, such testimony would have been consistent with and substantially the same as the contents of their affidavits, and (ii) for the purposes of the will construction only, Petitioner is Ardith's son born out of wedlock. Appendix to Petition, p. A-64.

in a class gift to issue in a biological ancestor's will, and that the evidence of decedent's intent did not overcome that presumption.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction under 28 U.S.C. §1257(3) and Supreme Court Rule 21.1(h) to grant a writ of certiorari because Petitioner did not make his constitutional claims in the state courts below.

II. The Petitioner's purported constitutional claims are grounded solely in a disagreement with the Court of Appeals over its construction of a state statute and raise no genuine issue of constitutional or federal law.

ARGUMENT

I. Petitioner Did Not Make His Constitutional Claims In The Courts Below.

Petitioner asserts jurisdiction to grant the writ on the basis of 28 U.S.C. §1257(3), which provides in pertinent part that a final judgment or decree of a State's highest court may be reviewed:

> "(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

At no time in this proceeding did Petitioner claim that a decision that by reason of his adoption out he ceased to be "issue" of his biological ancestors would deny him his constitutional or other federal rights. The claim was not raised even upon petition for reargument before the Court of Appeals. In such a case this Court has long held that it lacks jurisdiction to grant the

writ. *Webb v. Webb*, 451 U.S. 493 (1981). The jurisdictional defect under 28 U.S.C. §1257(3) is that Petitioner has not "set up or claimed" his federal right prior to petitioning this Court. *See Webb v. Webb*, 451 U.S. at 495. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *Accord, Tacon v. Arizona*, 410 U.S. 351 (1973); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836).

Supreme Court Rule 21.1(h) implements this requirement:

> "(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Petitioner has not attempted to comply with this rule because compliance would be impossible.

None of the opinions below passed on any federal question. "[I]t will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). No such showing has been made.[2]

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[2] Petitioner in the Court of Appeals did refer to, without raising as an issue, possible constitutional defects in a rule of will construction excluding him from "issue" by reason of his non-marital birth. The Court of Appeals explicitly declined to rest its decision on Petitioner's non-marital birth, and held that a person born out of wedlock is presumed to be included in a class gift to "issue". 66 N.Y.2d at 154-55, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347.

The Petition should be dismissed for lack of jurisdiction under 28 U.S.C. §1257(3) and failure to comply with Rule 21.1(h).

II. The Decision of The Court of Appeals Raises No Constitutional or Other Federal Issue.

Each of Petitioner's purported constitutional claims is based solely on his assertion that the Court of Appeals has engaged in the "judicial modification of an unambiguous statutory definition", and thereby has deprived him of his right to the equal protection of the laws and his right to due process of law under the Fourteenth Amendment to the United States Constitution. Petition, pp. i & ii. This assertion is grounded in Petitioner's argument to the courts below that the case is controlled by a definition of the term "issue" found in N.Y. Est., Powers & Trusts Law ("EPTL") §1-2.10. The Court of Appeals rejected this argument, holding that the statutory definition did not resolve the case one way or the other. The Petition herein attempts to make this argument once again by cloaking it in constitutional garb.

It is fundamental that the ultimate authority to construe and interpret a state statute lodges in the state's highest court, and not in this Court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The Court of Appeals did not "amend" or "modify" EPTL §1-2.10. It examined the statute, together with its legislative history, and determined that it did not control this case. No New York decision before or after enactment of the statute had construed the term "issue" in a testator's will as applied to a child adopted *out* of the testator's family. No New York decision had ever considered whether the statute had any bearing on such a case. The Court of Appeals found that the statute was intended to clarify the status of a child adopted *into* a testator's family, but otherwise was intended merely to codify prior decisional law:

> "EPTL 1-2.10, added in 1966, defines 'issue' as descendants in any degree from a common ancestor, unless a contrary intention is indicated, and specifically

> includes children adopted into the family, thus resolving a conflict which had existed in decisional law . . . . Other than that clarification, the Revisors' Notes indicate that the section merely codifies decisional law . . . ." 66 N.Y.2d at 154, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347 (citations omitted).

There being no prior decisional law on the status of an adopted-out child, the Court of Appeals found that the statute did not control this case. In so holding it was merely doing what courts do day in and day out, determining the meaning and extent of a statute's reach. The statute is "unambiguous" in the eye of Petitioner, but the majority of the Court of Appeals disagreed.

Petitioner claims that the Court of Appeals effected a retroactive change in the law. On the contrary, the issue was one of first impression in New York, recognized as such by the Court of Appeals. 66 N.Y.2d at 157, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348-49. Petitioner cites no prior New York case deciding the point.[3]

Petitioner's disagreement with the Court of Appeals as to the scope of EPTL §1-2.10 is not a claim under the Constitution or under federal law. This Court has long acknowledged state discretion to regulate the disposition of property at death within its borders. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972).

We need not repeat the "[p]owerful policy considerations," 66 N.Y.2d at 155, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347, which led the Court of Appeals to rule as it did. They are set forth in

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[3] Petitioner also made an argument in the courts below based on N.Y. Dom. Rel. Law §117, which is referred to in passing on pp. 7-8 of the Petition. Here too the Court of Appeals carefully considered the wording and history of the statute, concluding that it "certainly does not preserve the right to inherit a class gift in such circumstances." 66 N.Y.2d at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348.

the majority opinion. Petitioner has not made the slightest showing that the Court of Appeals' decision deprives him of any constitutional right.[4]

CONCLUSION

For the reasons set forth above, the Petition should be dismissed.

Respectfully submitted,

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February 19, 1986

[4] As part of his due process claim Petitioner asserts that he has been deprived of a "vested" property right. Petition, p. 21. Whether Petitioner had any property right at all was what was adjudicated in this case. Having failed to show that the Court of Appeals acted unconstitutionally in construing state law, Petitioner never had a constitutionally protected property interest. *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972).